COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

AN INVESTIGATION OF ELECTRIC RATES OF LOUISVILLE GAS AND ELECTRIC COMPANY TO IMPLEMENT A 25 PERCENT DISALLOWANCE OF TRIMBLE COUNTY UNIT NO. 1	))))	CASE NO. 10320

O R D E R

On August 8, 1989, Jefferson County, Kentucky ("Jefferson"), filed a motion requesting the Commission to reject a proposed settlement of this investigation submitted by the Louisville Gas & Electric Company ("LG&E") and the Commission's Staff ("Staff") and to adopt a hearing schedule to adjudicate the issues on their merits. Jefferson's motion is grounded on the claim that it has been denied due process as a result of ex parte settlement negotiations between LG&E and Staff. Jefferson further alleges that such ex parte conduct by Staff has created an "unconstitutionally sound proposal." Jefferson Motion, page 4.

On August 9, 1989, Residential Intervenors filed a motion, similar to Jefferson's, seeking rejection of the proposed settlement on grounds of ex parte negotiations. Residential Intervenors argue that while the Staff may perform an advisory role to the Commission, Staff lacks statutory authority to become a formal party in a Commission case. Staff's role in negotiating a proposed settlement is attacked by Residential Intervenors as being

analogous to a judge's clerk entering a settlement with only one litigant and then submitting that settlement to the judge.

Residential Intervenors further claim that if the proposed settlement can implement the rate disallowance of 25 percent of Trimble County without the need for additional record evidence, the Commission should immediately order a return of all rates collected subject to refund since July 1, 1988 and prospectively reduce rates to implement the 25 percent disallowance of Trimble County. However, if the Commission determines that additional evidence is needed prior to ordering refunds and rate reductions, Residential Intervenors object to any further delay in the procedural schedule for this investigation.

On August 15, 1989, the Attorney General's Office, Utility and Rate Intervention Division ("AG"), filed a response to: 1) the Commission's August 10, 1989 Order suspending LG&E's obligation to file testimony in this investigation; and 2) the Commission's August 14, 1989 Order establishing a schedule for the filing of comments and the establishment of a hearing on the merits of the proposed settlement. The AG urges the Commission to set aside its August 10 and 14 Orders and to reimpose upon LG&E the obligation to file testimony. In its response, the AG asserts that granting its request will not preclude the parties from conducting further settlement discussions but will cure the alleged defective procedures being followed by the Commission. The AG claims that its rights will be violated if the Commission proceeds to consider the merits of the proposed settlement agreement without affording the intervenors an opportunity to further participate and negotiate.

On August 16, 1989, Kentucky Industrial Utility Customers ("KIUC") also filed a response to the Commission's Orders entered August 10 and 14, and further filed a motion to expedite a hearing on the issue of refunds and rate reductions necessary to implement the 25 percent disallowance of Trimble County. KIUC argues that the proposed settlement "constitutes a retreat from the full Commission's Orders" and is therefore not legally defensible even if subsequently approved and adopted by the Commission. KIUC Response, page 2. This alleged "retreat" is based on the claim that the Commission's July 1, 1988 Order in Case No. 10064[1] required $11.4 million of revenues related to Trimble County construction work in progress ("CWIP") to be subject to refund because "this amount was to be disallowed." KIUC Motion, page 2.

Any settlement that does not provide for a $13-15 million refund does not, in KIUC's opinion, reflect the Commission's decision in Case No. 10064. KIUC argues that unless LG&E wants a hearing, none is needed to implement the disallowance of 25 percent of Trimble County. KIUC maintains that ratepayers have been overpaying $13.5 million annually since the Commission's July 1, 1988 Order in Case No. 10064 and that refunds and rate reductions should be ordered immediately.

On August 16, 1989, LG&E filed a response in opposition to the motions of Jefferson, Residential Intervenors, AG, and KIUC (collectively referred to hereinafter as "Intervenors"). LG&E

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1 Case No. 10064, Adjustment Of Gas and Electric Rates of Louisville Gas and Electric Company.

asserts that the Staff can negotiate a settlement of issues pending before the Commission and submit that settlement to the Commission for a decision on the merits. In this situation, Staff is merely making a recommendation, similar to the one made by any signatory to a settlement, that the settlement is in the public interest and should be adopted by the Commission.

While the intervenors who have filed objections to the settlement claim that it was the product of ex parte negotiations, LG&E maintains that settlement discussions with Staff do not violate any due process rights of Intervenors. LG&E notes its understanding that the spokesperson for the objecting Intervenors refused an offer by Staff to participate in further settlement negotiations. LG&E states that during the course of drafting the settlement proposal, those Intervenors either declined LG&E's efforts to discuss the substance of the settlement or did not return telephone calls.

LG&E urges that due process has not been denied to Intervenors but, rather, the Intervenors have voluntarily disabled themselves from participating in the negotiating process due to counsels' vacation schedules and the locations of their expert witnesses. Furthermore, LG&E argues that the Commission would be obligated to consider LG&E's proposed settlement even without Staff's concurrence. Numerous judicial opinions are cited for the proposition that a utility regulatory commission is on a sound legal basis in considering the merits of a proposed settlement that has not received unanimous support.

Based on the motions, the responses, the evidence of record, and being advised, the Commission is of the opinion and hereby finds that the motions to summarily reject the proposed settlement have no merit and they should be denied. The Commission's decision is based on a comprehensive review of the facts and circumstances leading up to the filing of the proposed settlement, as well as the relevant case law.

LG&E filed on June 14, 1989 a motion to adopt a settlement that would resolve not only the Trimble County issues under investigation in this case, but also LG&E's two appeals pending in the Franklin Circuit Court challenging the Commission's decisions in Case Nos. 9934[2] and 10064. After reviewing the parties' written comments on the settlement motion, the Commission issued an Order on July 20, 1989 establishing a settlement conference to commence on July 25, 1989 at the Commission's offices. The Commission subsequently designated a hearing officer to preside over the conference and directed Staff to participate as provided for by Commission Regulation 807 KAR 5:001, Section 4(4). That regulation provides that,

> (4) Conference with commission staff. In order to provide opportunity for settlement of a proceeding or any of the issues therein, an informal conference with the commission staff may be arranged through the secretary of the commission either prior to, or during the course of hearings in any proceeding, at the request of any party.

807 KAR 5:001, Section 4(4).

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[2] Case No. 9934, A Formal Review of the Current Status of Trimble County No. 1.

Questions regarding the Staff's participation and role in settlement conferences are not novel. The Intervenors previously objected to Staff's participation in a settlement conference in LG&E's last rate case, Case No. 10064. The objection there was that Staff's participation was improper because in the event a full settlement was not achieved, the Staff would subsequently participate in drafting an Order on the merits for the Commission.

In rejecting that claim in Case No. 10064, the Commission's March 17, 1988 Order, at pages 1-2, explained that:

> When a settlement document is tendered, it is the Commission which makes the determination as to whether it is in the public interest and should be accepted. If a full settlement is not reached, it is the Commission, not its Staff, that decides the merits of the issues. The Staff participates in the drafting of a final Order only as directed and instructed by the Commission.
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> The Commission is of the opinion that the Staff is an essential participant to any conference scheduled by the Commission. The Staff is the only participant that does not represent either ratepayers exclusively or the utility exclusively. Rather, the Staff, on behalf of the commission, represents the public interest. That interest includes a balancing of the ratepayers' interest to receive adequate, efficient, and reasonable service at the lowest possible cost and the utility's interest to provide that service at rates that fully compensate its investors for the risks assumed. This is a delicate balance to be struck by the Commission and its Staff.

The Commission now reaffirms that finding with respect to Staff's essential role in settlement conferences. And in the present case, Staff participation is heightened by the fact that LG&E's June 14, 1989 settlement motion encompassed litigation pending against the Commission. There can be no doubt that the Staff is the only entity authorized to negotiate a settlement of such litigation. Clearly, that litigation seeks judicial relief only

from the Commission with respect to its Orders. No relief is sought from any of the Intervenors who are also parties to that litigation.

The record indicates that settlement conferences were held at the Commission's offices on July 25, 28, and 31, 1989. In addition, the Intervenors met with LG&E on the evening of July 28, 1989. The Staff was unaware of that meeting until a few days after it occurred. Apparently the settlement negotiations concluded on July 31, 1989 with no agreement reached. Although the Intervenors' pending motions and responses claim that Staff then proceeded to negotiate on an ex parte basis with LG&E, an August 15, 1989 letter from Staff counsel to Jefferson's counsel indicates that the most active intervenors, through their designated spokesperson, refused to participate in further negotiations with LG&E. Whether that refusal was intended to be permanent or temporary is irrelevant.

Having declined to either further participate in negotiations or discuss with LG&E the substance of its settlement offer, the Intervenors have no basis to now claim that the settlement procedures violated their due process rights. See GLC Investment Co. v. Public Service Comm'n, 136 A.D.2d 857, 523 N.Y.S.2d 703, 707 (1988). ("Petitioner's representative attended at least two settlement conferences and the ALJ specifically advised representatives to become involved in negotiations. Petitioner was therefore accorded due process.") The Staff properly continued its efforts to negotiate a settlement with LG&E.

The Residential Intervenors' attempt to draw a parallel between the Staff's role in negotiating a settlement and a judge's clerk is clearly erroneous. The Court of Appeals for the District of Columbia Circuit set forth an extensive discussion of the authority of administrative agencies to settle contested matters pending before them, and how the functioning of those agencies is drastically different from that of a judge. In Pennsylvania Gas and Water Co. v. Federal Power Comm'n, 463 F.2d 1242, 1246, (D.C. Cir. 1972), the Court explained that:

> "[S]ettlement" carries a different connotation in administrative law and practice from the meaning usually ascribed to settlement of civil actions in a court. As we shall see later, in agency proceedings settlements are frequently suggested by some, but not necessarily all, of the parties; if on examination they are found equitable by the regulatory agency, then the terms of the settlement form the substance of an order binding on all parties, even though not all are in accord as to the result. This is in effect a "summary judgment" granted on "motion" by the litigants where there is no issue of fact.
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> This difference in procedure between the courts and regulatory agencies stems from the different roles each is empowered to play: the court must passively await the appearance of a litigant before it; once the court's process has been invoked, the litigant is entitled to play out the contest, unless he and the other litigant reach a mutually agreed settlement or one of several summary disposition procedures is successfully invoked by his adversary. On the other hand, the regulatory agency is charged with a duty to move on its own initiative where and when it deems appropriate; it need await the appearance of no litigant nor the filing of any complaint; once the administrative process is begun it may responsibly exercise its initiative by terminating the proceedings at virtually any stage on such terms as its judgment on the evidence before it deems fair, just, and equitable, provided of course the procedural requirements of the statute are observed. Only by exercising such "summary judgment" or "administrative settlement" procedures when called for can the usual interminable length of regulatory agency proceedings be brought within the bounds of reason and the agencies' competence to deal with them.

After soliciting a new settlement offer from LG&E, but prior to any agreement being reached, Staff counsel contacted each of the Intervenors' counsels to encourage their participation in a settlement. The Intervenors' response was to request a delay of up to three weeks to accommodate their vacation schedules and out-of-town expert witnesses. While the Intervenors certainly had the right to contact all their counsels and experts prior to engaging in substantive discussions of LG&E's new settlement offer, a three-week delay, until the week of August 21, 1989, was not reasonable under the circumstances of this case.

LG&E was obligated by the Commission's June 23, 1989 Order to file prepared testimony by August 14, 1989. Consequently, LG&E was entitled to know, prior to August 14, 1989, whether its settlement offer would be accepted by Staff or any intervenor. Further, the Commission's July 20, 1989 Order scheduling the settlement conference stated that time was of the essence due to LG&E's offer to reduce its electric rates. The Commission also notes that each of the Intervenors was available on or before August 15, 1989 to sign their respective motions and responses addressed in this Order.

The Intervenors are wrong in their claims that the ratepayers are entitled to an immediate refund of all Trimble County revenues collected subject to refund and a rate reduction to reflect the 25 percent disallowance. As the Commission stated in its July 1, 1988 Order in Case No. 10064, at page 10, "[T]here has been no specific testimony offered regarding the various options for rate-making treatment of a disallowance of 25 percent of the cost of

Trimble County. Furthermore. . .there has been no specific investigation of the revenue requirement effects of a 25 percent disallowance of Trimble County." Clearly, the Commission has made no findings as to the dollar amount of the disallowance. Claims of immediate entitlement to refunds and rate reductions are premature at best.

Furthermore, the Commission lacks the statutory authority to order immediate rate refunds or reductions in this case. The applicable statutory provision, KRS 278.270, mandates that in investigative proceedings the Commission may only prescribe new rates "after a hearing held upon reasonable notice." See KRS 278.270, Mayfield Gas Co. v. Public Service Comm'n, Ky., 259 S.W.2d 8 (1953).

The fact that the proposed settlement agreement was signed by LG&E and Staff, but none of the intervenors, does not lessen the Commission's obligation to review the agreement on its merits. There exists a substantial body of case law holding that utility commissions have an affirmative duty to review the merits of non-unanimous settlement agreements. As the United States Supreme Court declared in Mobile Oil Corp. v. Federal Power Comm'n, 417 U.S.283 (1974),

> No one seriously doubts the power--indeed, the duty--of FPC to consider the terms of a proposed settlement which fails to receive unanimous support as a decision on the merits. We agree with the DC Circuit that even assuming under the Commission's rules [a party's] rejection of the settlement rendered the proposal ineffective as a settlement, it could not, and we believe should not, have precluded the Commission from considering the proposal on its merits. (Citation omitted.)

Id. at 313-314. There exist strong policy reasons to support the settlement of claims. As the Supreme Court of Utah observed when reviewing the Utah Commission's approval of a contested settlement,

> The law has no interest in compelling all disputes to be resolved by litigation. One reason public policy favors the settlement of disputes by compromise is that this avoids the delay and the public and private expense of litigation. The policy in favor of settlements applies to controversies before regulatory agencies, so long as the settlement is not contrary to law and the public interest is safeguarded by review and approval by the appropriate public authority.

Utah Dept. of Admin. Serv. v. Public Service Comm'n, 658 P2d 601, 613-614 (Utah 1983).

The Commission is of the opinion that its first task is to consider the merits of the proposed settlement agreement. Should that settlement be found to be not in the public interest, the Commission will move quickly to reestablish a procedural schedule to adjudicate the issues pending in this investigation.

IT IS THEREFORE ORDERED that:

1. The motions filed by Jefferson, Residential Intervenors, and KIUC be and they hereby are denied.

2. The AG's request to reestablish a due date for the filing of testimony by LG&E be and it hereby is held in abeyance pending consideration of the merits of the proposed settlement agreement.

Done at Frankfort, Kentucky, this 21st day of August, 1989.

PUBLIC SERVICE COMMISSION

Chairman

Vice Chairman

Commissioner

ATTEST:

Executive Director